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AN EXPOSITION

OF THE

PREVENTION OF CORRUPTION
ACT, 1906.

(6 Edw. VII. c. 34.)

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BY

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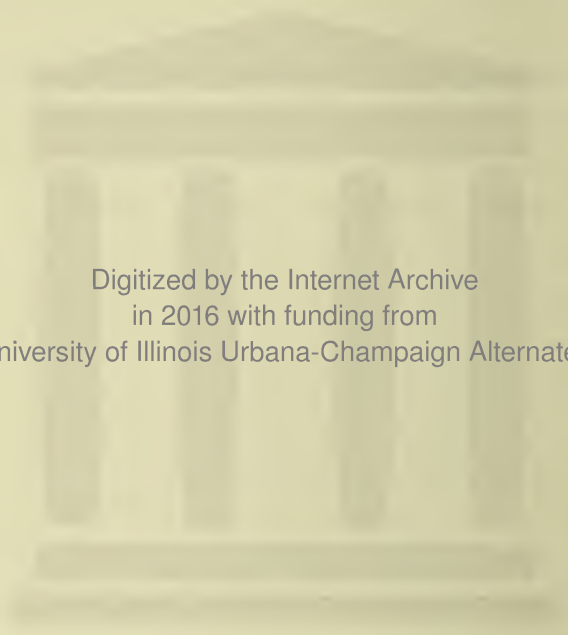
PREFACE.

WHEN the Legislature, in its wisdom, sees fit to constitute a new crime, and more especially when that new crime is one which strikes at an acknowledged and wide-spread practice, it behoves every man to ascertain, as far as he can, exactly what the new statutory offence is. An effort, however imperfect, has been made in the few following pages to facilitate his inquiry, and to afford him such information as may enable him to understand what corrupt transactions have been made criminal by the Prevention of Corruption Act, 1906. It is believed that this Act will redound to the best interests of commerce in all its branches, inasmuch as it has been designed to encourage honest trading, and to deter and punish those guilty of dishonest practices.

C. E. BRACKENBURY.

4, ELM COURT, TEMPLE, E.C.

July, 1907.



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OVER three hundred years ago—to be exact, in 1584—in *Heydon's Case* (3 Rep. 7 b), in considering whether certain copyhold estates came within the Statute *De Donis*, the Barons of the Exchequer unanimously resolved “that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered:—

- 1st. What was the common law before the making of the Act.
- 2nd. What was the mischief and defect for which the common law did not provide.
- 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.
- 4th. The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for the continuance of the mischief *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.”

These rules of interpretation have been commended in recent times (by Kay, L. J., in *Re Leavesley*, (1891) 2 Ch. 8), and as they seem to be peculiarly adaptable to a brief consideration of the Prevention of Corruption Act, 1906, it is proposed to adopt them as the framework of this exposition.

I.—WHAT WAS THE LAW BEFORE THE ACT?

In the first place, then, let us see what was the law before the passing of this Act. Wherever there exists a fiduciary relationship between two or more persons, the law requires that there shall be in all transactions complete openness, entire good faith, and no conflict of interests. This has been laid down over and over again. Lord Chancellor Cairns, in *Parker v. McKenna* (1874), 10 Ch. 118, said:—"Now the rule of this Court, as I understand it, as to agents, is not a technical or arbitrary rule. It is a rule founded upon the highest and truest principles of morality. No man can in this Court, acting as an agent, be allowed to put himself into a position in which his interest and his duty will be in conflict." Obviously, the connection of principal and agent gives rise to this fiduciary relationship, whether the agency be created by express terms, or presumed from the conduct of the parties, or from the position of master and servant. It matters not whether the agents be "general," as brokers, partners, or persons filling recognized positions; or "special," as when appointed for a particular occasion or purpose. Whether solicitor and client, doctor and patient, director and shareholder, stockbroker and customer, engineer and corporation, traveller and manufacturer, the fundamental requirement is the same; namely, that there shall be transparent honesty of conduct, and full disclosure of all business matters. The agent is the principal's second-self. Such is the general policy of the law; and from it follows the rule which forbids an agent who is employed to sell from becoming himself the buyer, or *vice versâ*, without giving his principal distinct notice (*Rothschild v. Brookman* (1829), 5 Bligh, N. S. 165). Lord St. Leonards, in the case of *Murphy v. O'Shea* (1845), 2 J. & Lat. 422, said that the rule of the Court "does not prevent an agent from purchasing from his principal, but only requires that he should deal with him at arm's length, and after a full disclosure of all that he knows with respect to the property. It must be a full disclosure of all that he knows; that, of course, means everything material which he knows." So also Sir George Jessel, Master of the Rolls, said in *Dunne v. English* (1874), 18 Eq. 524: "It is not enough for an agent to tell the principal that he is going to have an interest in the purchase, or to have a part in the purchase. He must tell him all the material facts. He must make a full disclosure." (For a recent case in which partial disclosure was held insufficient, see *Bartram v. Lloyd* (1904), in the Court of

Appeal, 90 L. T. 357.) An agent's undisclosed and conflicting interest in the matter vitiates the whole. Lord Langdale, Master of the Rolls, in *Gillett v. Peppercorne* (1840), 3 Beav. 78 (where a stockbroker was employed by the plaintiff to buy some shares, and the stockbroker bought them from persons who were mere trustees for him), said: "It is not necessary to show that fraud was intended, or that loss afterwards took place in consequence of the transactions, because the defendant, though he might have entertained no intention whatever of fraud, was placed in such a situation of trust with regard to the plaintiff that the transaction cannot, in the contemplation of the Court, be considered valid."

In *Salomons v. Pender* (1865), 3 H. & C. 639, an agent who had been employed to sell land, sold it to a company in which he was interested as a shareholder and director. It was held that the agent was entitled to no commission (as he would ordinarily have been) from his employer in respect of the sale. In this case, at p. 643, Martin, B., quoted Story on Agency, p. 262, sect. 210, as follows:—

In matters touching the agency, agents cannot act so as to bind their principals, where they have an adverse interest in themselves. This rule is founded upon the plain and obvious consideration that the principal bargains, in the employment, for the exercise of the disinterested skill, diligence, and zeal of the agent, for his own exclusive benefit.

This case was followed, and the extract cited with approval, in *Andrews v. Ramsay & Co.*, (1903) 2 K. B. 635, in which an agent sold property for his principal, and received a secret profit from the purchaser. It was held that the agent must not only account for that profit to his principal, but also that he was not entitled to any commission from his principal in respect of the transaction. In his judgment in this case, Lord Alverstone, C. J., at p. 638, says:—

A principal is entitled to have an honest agent, and it is only the honest agent who is entitled to any commission. In my opinion, if an agent directly or indirectly colludes with the other side, and so acts in opposition to the interest of his principal, he is not entitled to any commission. That is, I think, supported both by authority and on principle; but if, as is suggested, there is no authority directly bearing on the question, I think that the sooner such an authority is made the better. (Wills and Channell, JJ., concurred.)

This case of *Andrews v. Ramsay* (cited *supra*), taken together with the still more recent one of *Hippisley v. Knee Brothers*, (1905)

1 K. B. 1, is authority for the broad statement that where there is fraud in the transactions of an agent, he is not entitled to any commission from his principal; but where there has been no fraud, and the agent has honestly believed that he was entitled to retain a certain profit, which arises not directly out of the transaction itself, but through a third party, such retention will not in itself be enough to deprive him of his commission in respect of his transactions for his principal. In the latter case, which also came before Lord Alverstone, C. J., he said (at p. 8):—

If the Court is satisfied that there has been no fraud or dishonesty upon the agent's part, I think that the receipt by him of a discount will not disentitle him to his commission, unless the discount is in some way connected with the contract which the agent is employed to make or the duty which he is called upon to perform.

Secret Commissions.

One or two further extracts from judgments bearing upon the question of secret profits or commissions will show the judicial view taken with regard to them in civil actions. In a case of the year 1888 (reported in 39 Ch. D. 339), the defendant was the managing director of the plaintiff company. He had, unknown to the company, received a commission of one per cent. on a contract between his company and a firm of shipbuilders; and, further, he received bonuses on work done for his company by other companies in which he was a shareholder. In the Court of Appeal, Lord Justice Cotton said:—

In my opinion, if people have got an idea that such transactions can be properly entered into by an agent, the sooner they are disabused of that idea the better. If a servant or a managing director, or any person who is authorised to act, or is acting, for another in the matter of any contract receives, as regards the contract, any sum, either by way of percentage or otherwise, from the person with whom he is dealing on behalf of his principal, he is committing a breach of duty. It is not an honest act, and, in my opinion, it is a sufficient act to show that he cannot be trusted to perform the duties he has undertaken as servant or agent. He puts himself in such a position that he has a temptation not faithfully to perform his duty to his employer. He has a temptation, especially when he is getting a percentage on expenditure, not to cut down the expenditure, but to let it be increased, so that his percentage may be larger. I do not, however, rely on that, but what I say is this, that when an agent, entering into a contract on behalf of his principal, and without the knowledge or assent of that principal, receives money from the person

with whom he is dealing, he is doing a wrongful act, he is misconducting himself as regards his agency, and, in my opinion, that gives to his employer, whether a company or an individual, and whether the agent be a servant or a managing director, power and authority to dismiss him from his employment as a person who by that act is shown to be incompetent of faithfully discharging his duty to his principal.

In the same case, Lord Justice Bowen said :—

Now there can be no question that an agent employed by a principal or master to do business with another who, unknown to that principal or master, takes from that other person a profit arising out of the business which he is employed to transact, is doing a wrongful act inconsistent with his duty towards his master, and the continuance of confidence between them. He does the wrongful act whether such profit be given to him in return for services which he actually performs for the third party, or whether it be given to him for his supposed influence, or whether it be given to him on any other ground at all; if it is a profit which arises out of the transaction, it belongs to his master, and the agent or servant has no right to take it, or keep it, or bargain for it, or to receive it without bargain, unless his master knows it.

That certainly expresses very tersely and comprehensively the insidious subterfuges that the receiver of secret commissions sometimes resorts to.

As to what exactly constitutes a secret commission, or a bribe, there is fortunately a valuable definition of it by Romer, L. J., to be found in the case of *Hovenden & Sons v. Millhoff*, reported in (1900) 83 L. T. 43. He defines it thus :—

If a gift be made to a confidential agent with the view of inducing the agent to act in favour of the donor in relation to transactions between the donor and the agent's principal, and that gift is secret as between the donor and the agent (that is to say, without the knowledge and consent of the principal), then the gift is a bribe in view of the law.

His Lordship goes on to point out what are the consequences which follow thereupon :—

If a bribe be once established to the Court's satisfaction then certain rules apply. Amongst them the following are now established, and, in my opinion, rightly established, in the interests of morality, with the view of discouraging the practice of bribery. First, the Court will not inquire into the donor's motive in giving the bribe, nor allow evidence to be gone into as to the motive. Secondly, the Court will presume in

favour of the principal and as against the briber and the agent bribed, that the agent was influenced by the bribe; and this presumption is irrebuttable. Thirdly, if the agent be a confidential buyer of goods for his principal from the briber, the Court will assume as against the briber that the true price of the goods as between him and the purchaser must be taken to be less than the price paid to or charged by the vendor by, at any rate, the amount or value of the bribe.

Plea of Custom.

A word may here perhaps be suitably said as to the plea of custom, which has on several occasions been attempted to be put forward as a defence to an action. Of course, where the practice of the agent being paid by commission is well known and recognized, as in the case of stockbrokers, insurance agents, and shipbrokers, the generality of the usage is such that the principal must be presumed to have knowledge of it; further there is nothing secret or undisclosed about such *bonâ fide* trade customs. It is, however, a very different matter when it is alleged that a custom prevails that flies in the face of the fundamental doctrine, as we have seen, of the law of principal and agent, namely, that in such a fiduciary relationship there must be the utmost good faith. It is obvious that no plea of custom could prevail for secret commissions that undermined such relationships. This is what Lord Justice Thesiger, in the Court of Appeal, said in *De Bussche v. Alt* (1877), 8 Ch. D. 286:—

One matter alleged by the defendant, and actually supported by evidence, although in argument admitted to be untenable, ought not to pass without notice and reprobation; namely, an alleged custom or practice in ports in which the defendant trades, for an agent for sale with a minimum limit, himself to take at that limit, and at his own option, the thing he is employed to sell. We cannot but express the hope that the Court will never again hear of such a contention, or have before it such evidence.

Again, in *Lucifero v. Castel and Latta* (1887), 3 Times R. 371, Mr. Justice Grove said:—

Some things have been put down here as customary which, if they exist, I think the sooner they are abolished the better, *e.g.*, putting wrong sums as consideration in bills of sale.

In a later case, which came before the Court of Appeal, consisting

of Lord Esher, M. R., Lopes and Rigby, L. JJ. (*Bulfield v. Fournier* (1895), 11 Times R. 282)—

The Court expressed in strong terms their entire concurrence with the proposition which had been laid down by the judges on many occasions and was by no means new, viz., that an agent is not entitled to anything more than his agreed commission, and that the taking of any secret commission is dishonest and absolutely contrary to law. It was useless to attempt to justify such a practice by offering evidence as to the existence of a custom in any particular trade.

Available Remedies.

The remedies that were, and are, available for the enforcement of the civil rights of a principal may be briefly stated as follows:—He may recover all secret commissions; any fraudulent accounts can be reopened; he can dismiss without notice, or without payment in lieu of notice, any bribed servant; he whose agent has received a bribe may rescind the contract; if it be part performed and part paid for, he may still rescind and recover the payment made; and he may bring an action for damages for fraud both against the briber and the bribed agent. These civil remedies are no doubt still available either optionally or concurrently with a criminal prosecution.

Thus far, therefore, we have glanced at the effect of part of the law of principal and agent, especially in so far as secret commissions to an agent are concerned; the necessity for full disclosure of conflicting interests; the futility of pleading a trade usage; and the civil remedies available. Now let us turn our attention for a moment to the second part of our inquiry, and see what led up to the Prevention of Corruption Act, 1906, and to making the giving or receiving, &c. these bribes a crime and a new indictable offence.

II.—WHAT WAS THE DEFECT FOR WHICH THE LAW DID NOT PROVIDE?

It would be of interest to analyse the causes and conditions which have contributed to the spread of the ubiquitous bribe, but this is not the place for such an investigation. It may be well, though, just to call to mind that it is not so very long ago that corruption was rampant in high places where to-day there is not to be found the faintest suspicion of it. Readers of history will remember instances of corrupt buying and selling that went on in

Government Offices, in Parliament, and elsewhere. Before the rise of industrial England, an ordinary man had only his vote at election time to sell; and that he did heartily and well. With the development of commerce in the 19th century, there came the army of commission agents; and their proper methods of remuneration no doubt led to improper imitation by others. There came increasing competition, and with it increasing temptation to do business, if not by fair means, then by foul, but in any case to do business. The originally innocent little Christmas gift grew into the corrupt big present at Christmas or at any other time, given in consideration of favours in the past, and in the hope of more to come in the future. Casual and friendly forms of light refreshment became regular and business displays of heavy hospitality. So the "malignant canker" was fed and flourished, attacking all sorts and conditions of men, and all sections of professional and commercial life, including commissions to the curate for introducing hymn-books, to the doctor from the chemist or undertaker, to the solicitor from the stockbroker or banker, to the engineer from the contractor, to the architect from the ironmonger, to the salesman from the manufacturer, to the gardener from the nurseryman, and to the maid from the milkman.

Public Opinion and Previous Bills.

Thirty years ago the "Times" newspaper published a lot of correspondence on the subject, and on January 13, 1877, suggested that "where paid professional agents, such as solicitors, engineers, and architects are concerned, it might perhaps be made criminal to take these fees in secret." That has at last come to pass. In the intervening period there were several cases in the Law Courts, which drew attention to the evils of secret trade commissions.

The late Lord Chief Justice (Lord Russell of Killowen) in *Bulfield v. Fournier* (reported in (1894) 11 T. R. 62), said:—

I think it would be a very bad day for the commercial honesty of this country if the practice on the part of agents of putting profits into their own pockets, of which their principals knew not, were to be allowed to pass without the severest reprehension when the matter comes before a Court, and without being visited with the severest condemnation.

Two years later another similar action, which is reported in the "Drapers' Record," of July 11, 1896, came before his Lordship, who, in summing up, used these notable words:—

This business of corrupt bargains was a malignant canker; it was affecting honesty in all or in many details of the relations of life, and

was not confined to commercial relations. It was dishonest to fair trading; it was dishonest to the fair employer; it broke down that principle of morality which ought to be preserved among men who desire to cultivate and deserve honesty. The Legislature had made it a crime to make corrupt bargains with persons holding public positions—surveyors, architects, clerks of public bodies and the like, and if the evil, which constantly cropped up in Courts of Justice, continued, the Legislature must attempt the task of cutting out this canker, and so far as the matter rested with juries, they must not flinch from their duty.

Sir Edward Fry (formerly Mr. Justice Fry), by speeches and letters, also added the great weight of his influence in obtaining publicity for, and in drawing attention to, these corrupt trade bargainings. In a letter to the "Times" of September 12, 1896, he wrote:—

Bribery in one form or the other riddles and makes hollow and unsound a great deal of business, including transactions in which the professions of engineers and architects are interested. . . . Is it not possible that the great professions of engineers and architects may bestir themselves and consider whether something cannot be done to check practices which the honourable members of their callings admit and deplore? Is it too much to hope that the great body of honest and straightforward manufacturers and traders who find themselves hampered and vexed by the dishonest practices of those around them can pluck up heart of grace to expose and put down what I know harass them from day to day?

So public opinion was aroused. A special committee on secret commissions was appointed by the London Chamber of Commerce, who collected a great deal of evidence. Their report was published in 1899, and contained a mass of information. On April 20, 1899, Lord Russell introduced his Secret Commissions Bill in the House of Lords. The opening sentence of the explanatory memorandum ran as follows:—"The object of the Bill may be shortly stated as an effort to check, by making them criminal, a large number of inequitable and illegal secret payments, all of which are dishonest, and tend to stifle confidence between man and man, and to discourage honest trade and enterprise." That sentence may be equally well adopted to explain concisely the object and effects of the Act of 1906. Though Lord Russell's Bill did not become law, and though the Act is in some respects different from his Bill, none the less, as the Chaplain of Lincoln's Inn said, in paying a

tribute to Lord Russell's memory:—"His name will live in the recollection of the people of England as that of the judge who set himself the task of rebuking commercial dishonesty wherever he met it." After Lord Russell's death in 1900, Lord Halsbury and Lord Alverstone, C. J., took up the uncompleted task; and after five measures had been introduced, one was again brought forward last year, with the concurrence of Lord Loreburn, Lord Chancellor, and after being slightly amended, was passed, and became law. The "mischief and defect" for which the law did not previously provide was the insufficient checking of, and punishment for, offering and accepting illicit payments in commercial transactions.

III.—WHAT REMEDY THE PARLIAMENT HATH RESOLVED AND APPOINTED.

The third heading of interpretation is:—"What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth"; and from what has been said, and from what is known, it will certainly be agreed that the pernicious practice of secret commissions and gifts is indeed a "disease of the commonwealth." It has already been seen what are the civil remedies available to cure the disease; what "the Parliament hath resolved and appointed" further, is that henceforth such doers of obliquities as are being considered shall be liable to criminal prosecution and punishment. In short, trade bribes are made crimes. By adding a new crime to the statute book, the Legislature recognizes the evil, and the necessity of stigmatising the conduct as criminal, and further it is appreciative of the fact that there is a sound body of public opinion which approves of the legislative course adopted, for it is never safe to legislate in advance of the people. In fact, it is the people who make the laws. Criminal laws act as deterrents, to prevent certain practices which are injurious to society. They work on the balance of motives. Here it may be well to stop to consider the difference between intention and motive, for it will be found that it is important and helpful in construing the actual wording of the Act. The intention to kill a man has nothing to do with the motive which prompts the killing. The immediate intent (intention) of an agent may be to appropriate his principal's money; his ulterior intent (motive) may be to buy a motor-car. Generally speaking, the law takes no account of motive. A lawful act does not become unlawful because of a wrong motive prompting it; neither does an unlawful act become any less unlawful because

the motive which prompted it was a good one. If a crime is defined by a statute, as is the case in the Prevention of Corruption Act, 1906, then all that has to be proved is that that which the statute said should not be done has, in fact, been done. The mere doing of the deed is enough. Where a statute specifies an intention as part of the crime, as is the case in the third part of section 1 (1) of the Act under consideration, then that intention must, of course, be proved by the prosecution.

The Act 6 Edw. VII. c. 34.

The Act itself, 6 Edw. VII. c. 34, is set out in full in the Appendix A, p. 28. It will be seen that it is "An Act for the better Prevention of Corruption," and was passed on August 4th, 1906, and came into operation on January 1st, 1907. It is a short Act of four sections only, the first one being the important section setting out the new crimes.

SECTION 1.—This section has three sub-sections. The first sub-section is itself arranged in four clauses. The first of these deals with the corrupt act of any agent in accepting, &c. any gift. The second part is the converse of the first, and describes the corrupt act of any person, principal or otherwise, in giving, &c. any gift. The third part of the sub-section deals with the crime of knowingly giving or using any false document, &c., with intent to deceive. The fourth part sets out the punishments to be meted out to those who may be found guilty of any of the previously described crimes.

By re-arranging slightly, but keeping to the phraseology of these four parts of sub-section (1), as is done in Appendix B, p. 30, the exact significance of the sub-section and the various new crimes which are comprised within it, may be more easily understood. For yet further understanding the Act, it may be reduced to its simplest expression, by dealing with only one of the crimes at a time, eliminating for the moment the other variations of it. Thus, there are defined four (among other) crimes, as follows:—

(1) If any agent corruptly accepts from any person any gift or consideration as an inducement or reward for doing any act or for showing favour to any person in relation to his principal's affairs, he shall be guilty of a misdemeanour.

(2) If any person corruptly gives any gift or consideration to any agent as an inducement or reward for doing any act or

for showing favour to any person in relation to his principal's affairs, he shall be guilty of a misdemeanour.

(3) If any person knowingly gives to any agent any receipt or other document in which the principal is interested, and which contains any statement false or defective in any material particular, and which to his knowledge is intended to mislead the principal, he shall be guilty of a misdemeanour.

(4) If any agent knowingly uses with intent to deceive his principal any receipt or other document in which the principal is interested, and which contains any statement false or defective in any material particular, and which to his knowledge is intended to mislead the principal, he shall be guilty of a misdemeanour.

The maximum punishments under the Act vary according as to whether the prisoner is convicted on indictment, or upon summary conviction. If on indictment, he is liable to two years' imprisonment with hard labour, or to a fine not exceeding £500, or to both such imprisonment and such fine. If summarily convicted, he is liable to four months' imprisonment with hard labour, or to a fine not exceeding £50, or to both.

Sub-sections (2) and (3) of the first section give definitions. In the phrase "any gift or consideration," the word "consideration" includes "valuable consideration of any kind." Now this expression "valuable consideration" has received a very wide interpretation, and the accepted definition of it is this: "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other" (per Lush, J., *Currie v. Misa* (1875), L. R. 10 Ex. 162). "This definition," said Lord Lindley (in *Fleming v. Bank of New Zealand*, (1900) A. C. 586), "has been constantly accepted as correct. Their Lordships so treat it." The word "agent" is enlarged to include "any person employed by or acting for another"; and "a person serving under the Crown or under any corporation or any municipal borough, county, or district council, or any board of guardians." The word "principal" is extended to include an employer.

SECTION 2.—This deals with the procedure on the prosecution of offences, and contains safeguards against frivolous or malicious proceedings. The first of these safeguards is comprised in sub-section (1), which enacts that before any prosecution under this Act can be brought in England, the consent of the Attorney-

General or Solicitor-General must be obtained; or in Ireland, the consent of the Attorney-General or Solicitor-General for Ireland. (As regards Scotland, the Act, with the exception of the whole of section 2, applies to that country.) The fiat (or order or warrant) of the Attorney-General must be first obtained before any prosecution can be commenced. The fiat need not be produced or proved in Court (*R. v. Dexter, Laidler and Coates* (1899), 19 Cox, 360); it need only be lodged with the clerk of the Court.

The second safeguard against malicious prosecutions is contained in sub-section (2). This enacts that offences under the Prevention of Corruption Act, 1906, shall be added to those included in the Vexatious Indictments Act, 1859 (22 & 23 Vict. c. 17), and its amending Acts, the chief of which is the Criminal Law Amendment Act, 1867 (30 & 31 Vict. c. 35). Before the Vexatious Indictments Act, 1859, was passed, it was possible for a groundless accusation to be made against a person by preferring a bill of indictment before a grand jury without there having been any previous inquiry at all into the charge before a magistrate. A wicked or malicious man could, by adopting this course, often cause great pain and expense to absolutely innocent persons. With the object of preventing this, section 1 of the Vexatious Indictments Act, 1859, provides that :—

No bill of indictment for any of the offences [*set out in it*] shall be presented to or found by any grand jury, unless the prosecutor or other person presenting such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognizance to appear to answer to an indictment to be preferred against him for such offence, or unless such indictment for such offence, if charged to have been committed in England, be preferred by the direction or with the consent in writing of a judge of one of the superior courts of law at Westminster [*now* of the High Court of Justice] or of Her Majesty's Attorney-General or Solicitor-General for England, &c.

The operation of this section was restricted by the Criminal Law Amendment Act, 1867 (30 & 31 Vict. c. 35), for it was found that inconvenience arose through the objection, that was frequently taken, that the prisoner, when before the magistrate, had not been charged with the precise offence appearing on the indictment. It was, therefore, provided by the 1867 Act that section 1 of the Vexatious Indictments Act, 1859, should not apply so as to prevent

the presentment of any bill of indictment containing a count covered by the 1859 Act, if such count could be lawfully joined with other counts in the bill of indictment, and if such count was based upon evidence given before the magistrate and in the presence of the person charged with the offence. It is to be noted that counts, which the magistrate or justices have refused to commit upon, cannot be joined to others upon which he or they have committed the defendant, unless the prosecutor be bound over with regard to the dismissed charges. (*R. v. Crabbe* (1895), 59 J. P. 247.) That the prosecutor may so be bound over to prosecute is provided by section 2 of the Vexatious Indictments Act, 1859, which says:—

Where any charge or complaint shall be made before any one or more of Her Majesty's justices of the peace that any person has committed any of the offences [*set out in the Act*] within the jurisdiction of such justice, and such justice shall refuse to commit or to bail the person charged with such offence to be tried for the same, then in case the prosecutor shall desire to prefer an indictment respecting the said offence, it shall be lawful for the said justice, and he is hereby required, to take the recognizance of such prosecutor to prosecute the said charge or complaint, and to transmit such recognizance, information and depositions, if any, to the Court in which such indictment ought to be preferred, in the same manner as such justice would have done in case he had committed the person charged to be tried for such offence.

If the prosecutor thus proceeds with the charge, and the person so charged is subsequently acquitted, the prosecutor may be ordered by the Court to pay all the costs of the defence. (30 & 31 Vict. c. 35, s. 2.)

The third safeguard provided by the Act is the simple one laid down in sub-section (3), namely, that "every information for any offence under this Act shall be upon oath."

Sub-section (4) enacts that "the expenses of any prosecution on indictment under this Act shall be defrayed as in cases of indictment for felony." That is to say, as laid down by statute, principally the consolidating statute of 7 Geo. 4, c. 64, and especially sections 22—25 of it, and any amending Acts.

Sub-sections (5) and (6) refer to Courts of Quarter Sessions. By sub-section (5) such a Court has no jurisdiction in prosecutions on indictments for offences under this Act; but by sub-section (6), "any person aggrieved by a summary conviction under this Act

may appeal to a Court of Quarter Sessions." The appeal from a summary conviction may be either generally, by virtue of section 31 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), or by special case on a point of law, as provided by section 33 of the same statute; or alternatively under an earlier statute, the Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), s. 2. As to the general appeal, section 31 of the 1879 Act says that where any person is authorized to appeal from the conviction or order of a Court of Summary Jurisdiction to a Court of General or Quarter Sessions, he may appeal to such Court subject to certain conditions. These are embodied in the sub-sections of section 31. The appeal must be to the next practicable Court of Quarter Sessions having jurisdiction in the county, borough or place for which the Court of Summary Jurisdiction acted; and the Court must be holden not less than fifteen days after the day on which the decision was given upon which the conviction or order was founded. (Summary Jurisdiction Act, 1879, s. 31 (1).) Notice of appeal must be given in writing, and served on the other side and on the clerk of the Court of Summary Jurisdiction, within seven days after the day on which the said decision of the Court was given. (Summary Jurisdiction Act, 1879, s. 31 (2).) The appellant must then attend before any Court of Summary Jurisdiction within three days after the day on which he gave the said notice, and give security, either by deposit or recognizances, to appear at the hearing of the appeal, and to abide by the result. Some of the conditions of appeal laid down by the Summary Jurisdiction Act, 1879, are inconsistent with those imposed by the Quarter Sessions Act, 1849; but the former must be taken to repeal the latter. (*R. v. JJ. of Shropshire*, 6 Q. B. D. 669.)

As to an appeal by special case, section 33 of the Summary Jurisdiction Act, 1879, provides that "any person aggrieved who desires to question a conviction, order, determination or other proceeding of a Court of Summary Jurisdiction, on the ground that it is erroneous in point of law, or is in excess of jurisdiction, may apply to the Court to state a special case setting forth the facts of the case and the ground on which the proceeding is questioned, and if the Court decline to state the case, may apply to the High Court of Justice for an order requiring the case to be stated."

SECTION 3.—This section of the Prevention of Corruption Act, 1906, extends the Act to Scotland, with the exception of the whole

of section 2. In that country, "all offences which are punishable under this Act on summary conviction shall be prosecuted before the sheriff in manner provided by the Summary Jurisdiction (Scotland) Acts." These Acts are that of 1864 (27 & 28 Vict. c. 53) and that of 1881 (44 & 45 Vict. c. 33), which, together with the Criminal Procedure (Scotland) Act, 1887 (50 & 51 Vict. c. 35), ss. 4 to 15, and 58 to 71, and Schedule A, are applicable to all summary proceedings. All such proceedings are instituted by way of complaint (27 & 28 Vict. c. 53, s. 4).

SECTION 4.—This, the last section of the Act, gives its short title and date of commencement of operation, January 1st, 1907.

Having thus briefly gone through the "remedy that Parliament hath resolved and appointed to cure the disease of the Commonwealth," the true reason or meaning of the Act may now be considered.

IV.—THE TRUE MEANING OF THE ACT.

At first the interpretation of the Act appears to be rather difficult; and no doubt wherever there is a question of corruption or intention involved, there is bound to be some little trouble in determining what cases are within or without a statute. Every case must be decided by its own particular facts and circumstances. But if the main principles of the law of principal and agent are borne in mind, and also what was the state of things that this Act was intended to remedy; and if further the analogous enactments relating to corrupt and illegal practices at elections are remembered, the understanding of the Act will be facilitated.

What does "Corruptly" mean?

"If any agent corruptly accepts;" the first difficulty is obviously the word "corruptly." It is derived from *corruptus*, signifying "altogether broken or violated." Corruptly to offer or to accept a gift seems to mean to do so in violation of a legal duty. It is our duty to obey the law; and if a statute says that certain corrupt transactions and gifts shall not be permitted, and we persist in them, we break the law, fail in our legal duty, and the act is done corruptly. There are some judicial observations on this word, arising out of election petitions in the year 1869. In the *Bewdley*

Petition (19 L. T. Rep. 676), in referring to the Corrupt Practices Prevention Act, 1854, Blackburn, J., said:—

Those who framed the Act appear to have intended that it should comprehend almost everything that can by any possibility happen in this way (of treating) at an election, but they have governed it all by the word “corruptly.” The interpretation of this word . . . is not “wickedly,” “immorally,” or anything of that sort, but embraces such conduct as it was evidently the intention of the Legislature to discountenance. Where it is shown that even the smallest quantity of meat or drink is supplied, that is of course admissible as evidence of treating, but more than that would be required to make out a corrupt intention.

In my opinion, the sense of that may be applied to this Act of 1906, which is also comprehensive of “almost anything that can by any possibility happen in this way” of giving to an agent; and it is likewise governed by the word “corruptly.” The offer or acceptance of one drink at an election is not enough on which to found a corrupt intention; nor would it be enough to constitute a corrupt transaction with an agent. But where the one drink becomes a hundred drinks; where a person pays for lavish hospitality to an agent of a third party with whom he is in business relationship, and that hospitality—so-called—is dispensed secretly and as an inducement for showing favour, then the matter takes on a very different complexion, and in my opinion is undoubtedly within the Act.

In the *Northallerton Petition* (1869), 1 O.M. & H. at p. 173, Willes, J., says:—“When I say a promise is of a corrupt character, I call everything of a corrupt character which has a tendency to influence a man’s vote with reference to mere lucre instead of honest considerations.” If for the word “vote” we substitute “conduct,” I think this extract also throws some light on what is judicially held to be corrupt. The word “corruptly” may be taken, in my opinion, to mean in this Act doing that which the Legislature said should not be done. If it be found as a fact that such an act as was intended to be prohibited has been done, there will be no need to inquire into the motive of the guilty party or parties, for their intention has been to break the law, and their motive is immaterial. “The Court will not inquire into the motive of the vendor in giving the bribe, and there is an irrebuttable presumption that the agent was influenced by the bribe” (*Hovenden & Sons v. Millhoff* (1900), 83 L. T. 43). In another recent case

relating to the sale and purchase of a pair of horses on a certificate of soundness by a veterinary surgeon, it was discovered, during the trial of the action, that the defendant's agent (the veterinary surgeon) had accepted a bribe from the plaintiff (the vendor). The Court of Appeal held that "it was immaterial to inquire what effect the bribe had on the mind of the defendant's agent; that the offer and acceptance (of the bribe) invalidated the certificate; and that the plaintiff could not recover (any sum) under the contract which depended on the validity of the certificate." (*Shipway v. Broadwood*, (1899) 1 Q. B. 369.)

What does "with intent to" mean?

There does not appear to be any other difficulty of construction of the Act until we come to the third clause of sub-section (1) of the first section. This makes it a crime for any person *knowingly* to give to any agent, or for any agent *knowingly* to use with intent to deceive his principal, any receipt, &c. which is defective in any material particular, and which to his knowledge is intended to mislead the principal. Here nothing is said about "corruptly," but the word used is "knowingly"; also the phrases "with intent to deceive," and "intended to mislead" are employed. These three expressions, in this part of the section, obviously throw a greater burden of proof on the prosecution than in the case of the two foregoing clauses. To satisfy the requirements of the third clause, the state of mind of the person giving to the agent the false receipt, and the state of mind of the agent using the same, must be ascertained and proved. "The state of a man's mind is as much a fact as the state of his digestion." (*Edgington v. Fitzmaurice*, 29 Ch. D. 483.) As regards the expression "with intent to," it may have one of four or more different meanings. (1) It may refer to the sole intent; (2) to one of several concurrent intents; (3) to the principal or dominant intent; or (4) to the determining intent, without which the Act would not have been done. Which of these four meanings is the one to be applied it is difficult to say, but No. (3) is generally considered as being the most consonant with common sense. Bowen, L. J., in *Ex parte Hill* (1883), 23 Ch. D. 704, said:—"It is an exceedingly difficult thing (it is possible, no doubt, for juries may have to do it) to arrive at an opinion as to what is the dominant or operative motive of a man in doing a particular act. But if we are to consider whether, among all the shadows which pass across a man's mind, some view

as well as the dominant view influenced him to do the act, we shall be embarking on a dark and unknown voyage across an exceedingly misty sea."

As regards the "receipt, account, or other document" mentioned in clause 3, it is to be noted that there are three requirements to be fulfilled: First, the document must be one "in respect of which the principal is interested"; and, secondly, it must contain some "statement which is false or erroneous or defective in (some) material particular"; and, thirdly, it must, to the knowledge of the person giving it or of the agent using it, be intended to mislead the principal. This whole clause is, of course, aimed at those dishonest transactions in which a person gives to an agent a receipt which does not show the discount received by the agent; the suppression of the full, true, and material facts being intended to deceive the agent's principal. It does not matter whether the principal be actually deceived or not. It also covers those cases where two or more different accounts are sent for the same parcel of goods, in order that the agent may deliberately use the higher-priced account so as to get something from his principal to which he is not entitled, and of which the principal is ignorant.

ILLUSTRATIONS.

It is doubtful if it is advisable to endeavour to give illustrative examples of supposed cases that may come within the Act; for each instance must stand on its own merits, and be judged according to its particular circumstances. The slightest change in those circumstances may make all the difference between what is "Guilty" or "Not Guilty." But let it be supposed, for instance, that a contractor is desirous of doing work for a company or corporation from whom he has never hitherto received any order, though he has frequently tendered. He hears that some new work will shortly have to be given out. He sends the agent of the company or corporation a valuable present, which is secretly accepted. Soon afterwards the contractor receives the contract for the new work. Now here, as regards the contractor, whether he ever got any work or not, he would have brought himself within reach of this criminal law, for he corruptly made a gift to an agent as an inducement for showing favour in relation to his principal's business. As regards the company's agent, the matter is not quite so clear. If there are no other material circumstances in this supposititious case, I am of opinion that the Court would hold that,

if the jury found as a fact that the secret gift was accepted as an inducement to show favour, the agent must be deemed to have corruptly accepted it. The duty of the agent was either to return the gift, or to advise his principal of it, and act according to instructions.

Take the case, say, of an architect who is acting as the agent of a Hospital Board in the building of a new hospital or ward. A manufacturer of gas-stoves, or other apparatus that is required, agrees to give the architect a special discount if he will adopt the manufacturer's particular make of stove. If that special discount is not offered *bonâ fide* in a matter of keen cutting business, in accordance with the terms of the inquiry, but is offered as a reward for showing favour, then the manufacturer is liable under the Act. If the architect intends to pocket the difference between the ordinary and special discount, without disclosing all the circumstances to his Hospital Board, then he also will be guilty under the Act. Further, if the architect merely passes an account before his Board, in just the same form as he receives it from the manufacturer, which does not show on the face of it the special discount, and he does that with intent to deceive, then he is also liable under the third clause of section 1 (1). The manufacturer would himself be liable to pains and penalties if he knowingly gave that defective account to the architect with the knowledge that it was intended to mislead the architect's principal. Similar instances can be added to innumerable, and personal experience will no doubt suggest many.

THE FIRST CASE UNDER THE ACT.

Here, what is believed to be the first case under the new Act, may be referred to. It is to be found reported in detail on p. 6 of "The Manchester Guardian" of April 6, 1907. It is instructive, inasmuch as it tends to confirm the definition previously given of a "corrupt" gift, and to illustrate in a practical way the kind of trade corruption that is covered by this Act; and further, as exemplifying the class of case and evidence in and upon which the fiat of the Attorney-General will be issued. A clerk in the employ of cloth merchants was charged by a firm of carriers with having corruptly agreed to give their carter the sum of one shilling as a reward for his delivering twenty-eight bundles of cloth at certain addresses, at which the carter had no other reason to call in the ordinary course of his duty. The carter was an agent within the

meaning of the Act, being a "person employed by or acting for another." His duty was to carry cloth from the Lancashire and Yorkshire Railway goods yard at Salford to warehouses in the city. Having done that, his duty was to return to the yard for further orders. Instead of doing that, and in agreement with an arrangement to "put a few on," being promised an "allowance" by the clerk charged with the offence, the carter drove to the warehouse where the clerk was employed. There he received, and then proceeded to deliver, the said bundles of cloth. Being caught doing this by the carting inspector of the railway company, the delivery of the goods was stopped, and the prosecution begun. For the defence, it was endeavoured to be set up that there was a general custom to do as the carter had done; that is, to take goods from one warehouse to another to oblige customers of the railway company. The stipendiary magistrate, in fining the defendant 20s. and costs, and 10l. 10s. extra costs, said that "it must be clearly understood that this Act was passed with the intention, so far as it could be, of altering what had been an evil practice in cases of this kind."

TRADE CHRISTMAS PRESENTS.

Trade presents at Christmas time have also been a source of perplexity (and incidentally, of expense) to both givers and receivers (though the expense has fallen only on the givers). The Act might facetiously be described as one showing "How not to give Christmas Presents." The very phrase used, "Trade Christmas Presents," shows at once their object and nature. They are given as a reward for past favours, and as an inducement for further favours to come. It is idle to ask a question as to whether, generally, Christmas boxes are prohibited by the Prevention of Corruption Act, 1906. Some Yule-tide presents may be altogether corrupt and within the Act; and some may be entirely innocent and outside the Act. The "twopenny smoke," any more than the single drink, could scarcely be regarded as a corrupt transaction; and it most certainly could not be branded as an "inducement" for showing favour to anybody. But if a substantial present is given or offered to an agent, partly in a Christian spirit of peace and goodwill, but chiefly as an inducement or reward for doing, or forbearing to do, some act in relation to his principal's affairs, or for showing favour or forbearing to show disfavour, in my opinion, the gift is brought within the four corners of the Act. This being

so, it can only be said that the less honourable men of business have to do with such presents, the better for them, the better for trade, and the better for the country.

FUTILE DEFENCES.

A word may perhaps be added as to some futile defences that some may think they might be able to set up, in case, unhappily, they were to be brought face to face with judge and jury in a criminal court. As is well known, it will be of no use to plead ignorance of the statute or of its effect or meaning. Everyone is supposed to know the law. As we have already seen, even in civil actions, the plea of an alleged custom is of no avail. There cannot be a custom for a crime. It will be no use to urge the old Adam-like excuse that it was the wife who was the real offender and acceptor of the corrupt gift. If a wife, or any other sub-agent acts for, and in the place of, the real agent, either or both will be liable. *Qui facit per alium, facit per se.* (He who does a thing by another does it himself.) It will be unavailing to plead a small salary and a large family. Such circumstances, like any other surrounding difficulty or temptation, may be pleaded in mitigation of the punishment for the offence, but not in excuse of the crime itself. But undoubtedly a great moral responsibility rests upon committees of corporations, boards of directors, employers, and other principals, for the inadequate remuneration that they sometimes give to their agents and servants, who are often placed in delicate positions of great trust, who have to supervise costly work and carry out large contracts, and who have the right to say, "Lead us not into temptation."

TEST QUESTIONS.

There are four questions, in connection with the interpretation of this Act, that may perhaps be regarded as test or touch-stone queries, to ascertain, in part at least, whether any particular set of circumstances and acts constitutes the newly-made crime. They are these:—

(1) Was the transaction one which it was the intention of the Legislature to hit at?

(2) Was the gift intended to serve as an inducement or reward?

(3) Was the gift secret ?

(4) Would either party object to the principal knowing of all the circumstances of the gift ?

According to the answers given to these questions, a more or less decisive view of the circumstances of any particular case will be able to be taken.

The final and practical conclusion of the whole survey of the Prevention of Corruption Act, 1906, is that the professional or commercial man will be well advised to keep rigidly to a strict and straight course, and steer clear of the deceptive shoals of questionable profits and doubtful practices.

APPENDIX A.

PREVENTION OF CORRUPTION ACT, 1906.

[6 EDW. VII. c. 34.]

A.D. 1906. *An Act for the better Prevention of Corruption.* [4th August, 1906.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Punishment
of corrupt
transactions
with agents.

- 1.—(1) If any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or

If any person corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or

If any person knowingly gives to any agent, or if any agent knowingly uses with intent to deceive his principal, any receipt, account, or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal;

he shall be guilty of a misdemeanour, and shall be liable on conviction on indictment to imprisonment, with or without hard labour, for a term not exceeding two years, or to a fine not exceeding five hundred pounds, or to both such imprisonment and such fine, or on summary conviction to imprisonment, with or without hard labour, for a term not exceeding four months, or to a fine not exceeding fifty pounds, or to both such imprisonment and such fine.

(2) For the purposes of this Act the expression "consideration" includes valuable consideration of any kind; the expression "agent" includes any person employed by or acting for another; and the expression "Principal" includes an employer. A.D. 1906.
—

(3) A person serving under the Crown or under any corporation or any municipal, borough, county, or district council, or any board of guardians, is an agent within the meaning of this Act.

2.—(1) A prosecution for an offence under this Act shall not be instituted without the consent, in England of the Attorney-General or Solicitor-General, and in Ireland of the Attorney-General or Solicitor-General for Ireland. Prosecution of offences.

(2) The Vexatious Indictments Act, 1859, as amended by any subsequent enactment, shall apply to offences under this Act as if they were included among the offences mentioned in section one of that Act. 22 & 23 Vict. c. 17.

(3) Every information for any offence under this Act shall be upon oath.

(4) The expenses of any prosecution on indictment under this Act shall be defrayed as in cases of indictment for felony.

(5) A Court of Quarter Sessions shall not have jurisdiction to inquire of, hear, and determine prosecutions on indictments for offences under this Act.

(6) Any person aggrieved by a summary conviction under this Act may appeal to a Court of Quarter Sessions.

3. This Act shall extend to Scotland, subject to the following modifications:— Application to Scotland.

(1) Section two shall not extend to Scotland:

(2) In Scotland all offences which are punishable under this Act on summary conviction shall be prosecuted before the sheriff in manner provided by the Summary Jurisdiction (Scotland) Acts.

4.—(1) This Act may be cited as the Prevention of Corruption Act, 1906. Short title and commencement.

(2) This Act shall come into operation on the first day of January nineteen hundred and seven.

APPENDIX B.

THE PREVENTION OF CORRUPTION ACT, 1906.

[6 Edw. VII. c. 34.]

RE-ARRANGEMENT OF SECTION 1, SUB-SECTION (1).

IF ANY AGENT CORRUPTLY { (a) accepts or obtains, *or*
 (b) agrees to accept, *or*
 (c) attempts to obtain

from any person { (a) for himself *or*
 (b) for any other person,

any gift or consideration as an inducement or reward
 { (a) for doing or forbearing to do, *or*
 (b) for having (after the passing of this Act) done or forborne to do,

any act in relation to his principal's affairs or business, *or*
 { (a) for showing favour or disfavour, *or*
 (b) forbearing to show favour or disfavour

to any person in relation to his principal's affairs or business ;

OR

IF ANY PERSON CORRUPTLY { (a) gives *or*
 (b) agrees to give *or*
 (c) offers

any gift or consideration to any agent as an inducement or reward
 { (a) for doing or forbearing to do, *or*
 (b) for having (after the passing of this Act) done or forborne to do,

any act in relation to his principal's affairs or business, *or*
 { (a) for showing favour or disfavour, *or*
 (b) forbearing to show favour or disfavour

to any person in relation to his principal's affairs or business ;

OR

{ (a) IF ANY PERSON KNOWINGLY gives to any agent, *or*
 (b) IF ANY AGENT KNOWINGLY uses with intent to deceive his principal,

any receipt, account, or other document
 { (a) in respect of which the principal is interested, *and*
 (b) which contains any statement which is false or erroneous or defective
 in any material particular, *and*
 (c) which to his knowledge is intended to mislead the principal :

THEN

HE SHALL BE GUILTY OF A MISDEMEANOUR, and shall be liable

- | | | |
|-----------------------------|---|--|
| on conviction on indictment | { | (a) to imprisonment, with or without
hard labour, for a term not ex-
ceeding two years, <i>or</i>
(b) to a fine not exceeding five hundred
pounds, <i>or</i>
(c) to both such imprisonment and such
fine ; |
|-----------------------------|---|--|

OR

- | | | |
|-----------------------|---|--|
| on summary conviction | { | (a) to imprisonment, with or without
hard labour, for a term not ex-
ceeding four months, <i>or</i>
(b) to a fine not exceeding fifty pounds,
<i>or</i>
(c) to both such imprisonment and such
fine. |
|-----------------------|---|--|

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